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**MAILED**

**MAR 08 2011**

**OFFICE OF PETITIONS**

Northwest Software, Inc.  
Attn.: Chetan Shah, Vice-President  
PPO Box 91396  
Portland OR 97291-0396

In re Application of :  
Shah, et al. : **DECISION ON PETITION**  
Application No. 09/757,322 :  
Filed: January 9, 2001 :  
For: EMPLOYMENT RECRUITING :  
SYSTEM :

This is a decision on the renewed petition under 37 CFR 1.137(a), filed May 25, 2010, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is not a final agency decision.

This application became abandoned June 29, 2008 for failure to timely submit a proper reply in response to the Decision by the Board of Patent Appeals and Interferences mailed April 28, 2008. The Decision set a two month period of time for reply. Notice of Abandonment was mailed August 19, 2008.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The instant petition fails to satisfy requirement (3) set forth above.

The Office may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Director to have been "unavoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important

business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

Petitioner states:

- “1. I am the first and primary inventor. Due to a surgery I was in disability for an extended period of time (see attached payments of disability by insurance company). I had a life-threatening reaction to the surgery that required that I be rushed to the hospital.
2. There are pending claims allowed in the Board Decision rendered on April 28, 2008. Our attorney of record at the time emailed me on June 2, 2008: The case will be returned to the examiner and we should receive an Office action to amend the allowed claims but that is somewhere in the future." We never received any such office action.
3. On June 23, 2008 the attorney of record filed a request to withdraw as attorney or agent of record. The attorney stated that "You have failed to pay one or more bills". This reason is misleading as our understanding is for a fixed-fee arrangement after the patent process is completed. I was therefore surprised that the USPTO approved on 9/8/2008 the attorney's request to withdraw as our attorney without giving us the opportunity to respond or consider our evidence.”

Petitioner seemingly attributes the delay in timely responding to the Board decision to communications between petitioner and his prior counsel and to his own medical condition.

In general, the Office looks to the actions or inactions of duly authorized and voluntarily chosen representatives of an applicant. Further, applicant is bound by the consequences of those actions or inactions. See, Link v. Wabash, 370 U.S. 626, 633-34 (1962). Thus, as to petitioner's communication with former counsel by which petitioner did not believe that further response from applicant was required, such miscommunication is not suitable grounds for a finding of unavoidable delay.

As to petitioner's assertion that his medical condition prevented a timely response to the Decision mailed April 28, 2008, petitioner has failed to establish that the medical condition precluded timely reply to the Decision mailed April 28, 2008 by either petitioner or anyone with requisite authority at the assignee company.

As to petitioner's medical condition, petitioner has failed to establish a nexus between the medical condition and the failure to timely submit a properly reply to the Decision mailed April 28, 2008. Petitioner does not indicate when his medical condition commenced and ended. Though not required to do so, petitioner has not provided documents from licensed health care providers, demonstrating the nature and extent of petitioner's medical condition, in such a

manner that establishes that petitioner was, from the date a reply was to the outstanding Office communication was due until the filing of the instant petition, "unavoidably" prevented from timely submitting a proper reply to the Decision. Additionally, petitioner has failed to indicate how he managed to conduct his daily personal and business affairs, including scheduling and settlement of short and long term debts and business obligations, bills, rent or mortgage payments, income taxes etc., during the time period at issue. Petitioner has not established that the assignee was likewise precluded from timely replying to the Decision.

Petitioner must demonstrate that his health problems were such as to cause the reply to the Decision to have been unavoidably delayed. Petitioner must establish that both petitioner and the assignee company were precluded from timely submitting a proper reply to the Decision mailed April 28, 2008.

As to petitioner's concern that a request to withdraw as attorney was granted in the instant case, petitioner is advised that prior counsel was properly withdrawn because at the time that the request was acted upon, the instant application was abandoned.

The instant petition lacks sufficient documentary evidence of the events complained of. Accordingly, it cannot be found that the entire delay in timely submitting a proper reply to the Decision mailed April 28, 2008 was unavoidable.

Any renewed petition must be accompanied by evidence to sufficiently establish that the entire period of delay in responding to the non-final Office action was unavoidable.

#### **ALTERNATE VENUE**

Petitioner may wish to consider filing a petition stating that the entire delay was unintentional. Petitioner's attention is directed to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable". An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee and reply.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b). The Director may require additional information where there is a question whether the delay was unintentional.

Further correspondence with respect to this matter should be addressed as follows:

By mail:                      Mail Stop Petition  
                                    Commissioner for Patents  
                                    P.O. Box 1450

Alexandria, VA 22313-1450

By facsimile: (571) 273-8300

By hand: U.S. Patent and Trademark Office  
Customer Window  
Mail Stop Petition  
Randolph Building  
Dulany Street  
Alexandria, VA 22314

Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3205.

*/ALESIA M. BROWN/*

Alesia M. Brown  
Attorney Advisor  
Office of Petitions

Enclosure